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September 19, 2019

## **OFAC Reaches Settlement Agreement with U.K. Bank for Complex Payment Structures Used to Circumvent U.S. Sanctions**

### **OFAC Also Significantly Reduces Penalty Based on U.K. Regulator Input**

On September 17, 2019, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") announced a \$4,000,000 settlement agreement with the British Arab Commercial Bank plc ("BACB"), a commercial bank located in the United Kingdom, for apparent violations of OFAC's Sudanese Sanctions Regulations ("SSR").<sup>1</sup> Specifically, OFAC determined that 72 bulk U.S. dollar payments processed by BACB through U.S. financial institutions were apparent violations of OFAC's Sudan regulations because they were used to fund a U.S. dollar account at a non-U.S. financial institution, which was in turn used to process payments for Sudanese parties with accounts at the same bank.<sup>2</sup> As OFAC stated in its announcement, this enforcement action "highlights the risks surrounding[] the use of complex payment structures, including bulk funding arrangements, to process payments on behalf of, or otherwise involving, U.S. sanctions targets."<sup>3</sup> The settlement agreement is also notable because OFAC determined, in consultation with one of the bank's U.K. regulators, to suspend all but \$4 million of the proposed penalty of \$228,840,000 in view of the bank's limited "operating capacity."

### **Apparent Violations – BACB's Bulk Fund Transfers Ultimately Used for U.S. Dollar Payments Related to Sudan**

According to OFAC, BACB operated U.S. dollar accounts on behalf of Sudanese financial institutions, including the Central Bank of Sudan. BACB solicited U.S. dollar business from these Sudanese entities and processed U.S. dollar transactions via an internal book transfer process involving a nostro account maintained at a non-U.S. financial institution. According to OFAC, although these transactions were not processed through the U.S. financial system, the funding of the nostro account did involve transactions processed through U.S. financial institutions in apparent violation of OFAC's Sudan Regulations.<sup>4</sup>

OFAC stated that the nostro account was established for the purpose of facilitating payments involving Sudan. To fund this account, BACB made periodic bulk payments to the nostro account from accounts in certain other non-U.S. financial institutions located in Europe. Each of these bulk funding payments were processed through U.S. dollar correspondent banks that are located in New York. The funds in the nostro account were then used to process individual payments for various Sudanese parties. According to OFAC, its analysis confirmed that the bulk funding payments, which were all processed through the U.S., correspond to the payments made to Sudanese parties. Between September 21, 2010 and August 27, 2014, BACB processed 72 bulk funding payments totaling \$190,700,000 related to Sudan, which corresponded

with several hundred Sudan-related payments totaling slightly more than \$197,700,000 processed during the same date range.<sup>5</sup>

Notably, “[s]everal managers along with a member of the Compliance Department within BACB were aware of this funding arrangement, and how it would attempt to circumvent” U.S. sanctions.<sup>6</sup> However, OFAC also noted that these individuals believed that all Sudanese transactions would be processed outside the United States.<sup>7</sup>

In July 2014, shortly after OFAC’s settlement with BNP Paribas,<sup>8</sup> BACB’s senior management decided to cease and review Sudanese U.S. dollar transaction activity. In September 2014, BACB initiated an internal investigation into potential violations of OFAC’s Sudan regulations, and in December of that year, the bank notified OFAC of the investigation.<sup>9</sup>

### **Factors Affecting OFAC’s Penalty Determination**

OFAC determined that BACB did not make a voluntary self-disclosure and that the apparent violations constituted an egregious case. OFAC did not explain why BACB’s notification of an internal investigation in December 2014 did not warrant voluntary self-disclosure credit. The total base penalty amount for the apparent violations was \$381,400,000. The penalty amount proposed by OFAC, \$228,840,000, reflected OFAC’s consideration of certain facts and circumstances (as described below) pursuant to OFAC’s Economic Sanctions Enforcement Guidelines.<sup>10</sup>

However, after consulting with one of BACB’s domestic regulators, the United Kingdom’s Prudential Regulation Authority, OFAC determined that the operating capacity of BACB, a bank with approximately £3.2 billion in total assets, was such “that it would face disproportionate impact if required to pay the proposed penalty of \$228,840,000.”<sup>11</sup> As a result, although “OFAC agree[d] to a settlement in the amount of \$228,840,000,” the agreement requires BACB to remit only \$4,000,000 while the remainder of the settlement amount is suspended so long as BACB annually certifies, for a period of five years, sanctions compliance measures that are designed to minimize the risk of recurrence of similar conduct in the future.

OFAC found several aggravating factors, including:

- “BACB appears to have demonstrated at least a reckless disregard for U.S. sanctions regulations when it employed a years-long practice of processing Sudan-related transactions through the United States in a manner that obfuscated the underlying purpose from U.S. financial institutions;”
- “BACB appears to have ignored warning signs that reasonably should have put the bank on notice that its conduct constituted a violation of U.S. law (for example, the bank’s knowledge of U.S. authorities’ sanctions-related enforcement actions involving other European banks engaging in similar conduct);”

- “[S]everal members of the bank’s senior management were aware of and involved in the conduct giving rise to the apparent violations;”
- “BACB conferred substantial economic benefit to persons in Sudan and caused significant harm to the integrity of a U.S. sanctions program and its associated policy objectives by processing USD transactions to or through the United States in apparent violation of the SSR for a number of years;” and
- “BACB is a commercially sophisticated financial institution.”<sup>12</sup>

OFAC also found several mitigating factors, including the lack of an OFAC penalty or Finding of Violation in the last five years; the provision of significant investigative leads regarding the non-U.S. financial institution; and full cooperation, including agreeing to multiple extensions of a tolling agreement. In addition, “BACB has also represented to OFAC that it does not have a strong financial position to withstand a substantial civil money penalty.” Finally, OFAC noted as a mitigating factor several remedial factors undertaken by BACB, including hiring new senior management (including a new Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Chief Risk Officer, Chief Controls Officer, Chief Compliance Officer, and in-house General Counsel).

In the settlement agreement, BACB also agreed to undertake 22 compliance commitments and to certify its compliance annually for a five-year period—which has now become a standard feature of OFAC settlements.<sup>13</sup>

### **Implications**

This matter demonstrates that OFAC will pursue enforcement against non-U.S. entities for complex payment and funding structures that circumvent U.S. sanctions. This settlement makes clear that even where payments involving sanctions targets are not directly processed through the United States, financial institutions can be liable where funding of those payments can be traced to and correspond with activity processed in the United States. In this case, OFAC obtained evidence that bank personnel acknowledged that the payment arrangements were an attempt to circumvent U.S. sanctions, and the bulk payments that were processed through the U.S. financial system corresponded virtually jot-for-jot with the payments made to sanctioned parties. It is unclear whether OFAC would have taken a different view of this case if one or both of these factors were different. In any event, OFAC has emphasized that it is committed to ensuring that complex payment structures, like bulk funding, “do not represent an avenue for sanctions targets to indirectly access the U.S. financial system, realizing that bulk funding is an important part of correspondent banking practice.”

This settlement is also notable for the significant penalty discount that OFAC applied in light of OFAC’s finding, in consultation with one of the bank’s domestic regulators, of a “disproportionate impact” to the

BACB's operating capacity if it were forced to pay the full proposed penalty of \$228,840,000.<sup>14</sup> OFAC explained that it considered this issue under General Factor K of its Economic Sanctions Enforcement Guidelines,<sup>15</sup> which provides for the consideration of "other factors that OFAC deems relevant on a case-by-case basis in determining the appropriate enforcement response and/or penalty amount."<sup>16</sup> Such consideration is afforded to ensure that OFAC's enforcement "is proportionate to the nature of the violation."<sup>17</sup>

We will continue to monitor sanctions developments and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- <sup>1</sup> On June 29, 2018, the SSR were discontinued by OFAC. See U.S. Dep’t of Treasury, OFAC, *Removal of the Sudanese Sanctions Regulations and Amendment of the Terrorism List Government Sanctions Regulations* (June 29, 2018), available [here](#).
- <sup>2</sup> U.S. Dep’t of Treasury, OFAC, *British Arab Commercial Bank plc Settles Potential Liability for Apparent Violations of the Sudanese Sanctions Regulations* (Sep. 17, 2019), available [here](#) (“OFAC Web Notice”).
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> U.S. Dep’t of Treasury, OFAC, *Settlement with BABC* (Sep. 17, 2019), at ¶ 22, available [here](#) (“Settlement Agreement”).
- <sup>6</sup> *Id.* at ¶ 11; OFAC Web Notice.
- <sup>7</sup> *Id.*
- <sup>8</sup> U.S. Dep’t of Treasury, OFAC, *BNP Paribas SA Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs* (June 30, 2014), available [here](#).
- <sup>9</sup> Settlement Agreement, at ¶¶ 6, 20.
- <sup>10</sup> OFAC Web Notice. See also 31 C.F.R. part 501, app. A. “General Factors Affecting Administrative Action.”
- <sup>11</sup> As of June 30, 2019, BACB had total assets worth £3.24 billion. See BACB, *2019 Factsheet*, available [here](#).
- <sup>12</sup> OFAC Web Notice.
- <sup>13</sup> Settlement Agreement, at ¶ 28; see also Paul, Weiss, *OFAC Issues Guidance on Sanctions Compliance Programs and Flags “Root Causes” Underlying Prior Enforcement Actions* (May 14, 2019), available [here](#).
- <sup>14</sup> Settlement Agreement, at ¶ 26.

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<sup>15</sup> *Id.*

<sup>16</sup> *See* 31 C.F.R. part 501, app. A. “General Factors Affecting Administrative Action.”

<sup>17</sup> *Id.*